Alloy Consolidated Sdn Bhd & Anor v Dato' Dr Hj Adam bin Harun

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 03(I)-1 OF 2008(W)
ARIFIN ZAKARIA CJ (MALAYA), HASHIM YUSOFF AND JAMES FOONG FCJJ
16 MAY 2011

Civil Procedure — Amendment — Counterclaim — Amendment to add new counterclaim — Whether counterclaim statute-barred if filed as fresh action — Whether counterclaim commenced on same date as action in which it was pleaded — Limitation Act 1953 s 31

The first defendant in the trial court, Anjaria Properties Sdn Bhd ('Anjaria'), had been commissioned to carry out certain building and construction works ('the projects'). Due to cash flow problems, Anjaria, through its executive chairman, the respondent, sought the appellants' help to complete the projects. An agreement was reached whereby Anjaria publicly remained as contractor for the projects while the actual work was carried out by the second appellant for an agreed fee and the first appellant advanced monies to settle Anjaria's debts. Sometime later, Anjaria appointed contractors to replace the appellants' role in the projects. The appellants took this as an act of repudiation and terminated their agreement with Anjaria and the respondent. On 25 June 2001, the appellants filed an action in the High Court against Anjaria and the respondent for various monies owing to them under the projects. On 30 June 2004, Anjaria filed an application to amend its statement of defence. A similar application was filed by the respondent on 9 July 2004 to amend his statement of defence which included a new counterclaim. The registrar dismissed Anjaria's application but allowed the respondent's. On appeal to the Judge, Anjaria's application was allowed and the registrar's decision on the respondent's application was affirmed. The appellants' appeals to the Court of Appeal against both those decisions were dismissed. Leave was granted to appeal to the Federal Court. The appellants contended that the cause of action on which the new counterclaim was based occurred in February 1998 and as the counterclaim was only sought to be added by way of amendment on 9 July 2004, it was statute-barred.

Held, dismissing the appeal with costs:

(1) Had the counterclaim been filed as a fresh action, it would have been barred by limitation. But since it was filed as a counterclaim, s 31 of the Limitation Act 1953 applied. The counterclaim was not statute-barred.

By virtue of s 31 the counterclaim was deemed to be a separate action and to have commenced on the same date as the action in which it was pleaded ie 25 June 2001 (see paras 30 & 33).

(2) The date of filing of the counterclaim related back to the date of the original action. Taking the cause of action as accruing in February 1998, as pleaded by the appellants, the respondent's application was well within the 6-year period on the date the action was commenced by the appellants (see para 33).

[Bahasa Malaysia summary

Defendan pertama di mahkamah perbicaraan, Anjaria Properties Sdn Bhd ('Anjaria'), telah ditugaskan untuk menjalankan kerja-kerja bangunan dan pembinaan ('projek-projek'). Akibat daripada masalah kewangan, Anjaria, melalui pengerusi eksekutifnya, responden, memohon pertolongan perayu-perayu untuk menyelesaikan projek-projek tersebut. Persetujuan telah dicapai di mana secara umum Anjaria kekal sebagai kontraktor sementara untuk projek-projek tersebut sementara kerja sebenar dijalankan oleh perayu kedua untuk fi yang dipersetujui dan perayu pertama membayar wang pendahuluan untuk menyelesaikan hutang Anjaria. Tidak berapa lama kemudiannya, Anjaria melantik kontraktor-kontraktor untuk menggantikan peranan perayu-perayu dalam projek-projek tersebut. Perayu-perayu mengambil ini sebagai tindakan penolakan dan menamatkan perjanjian mereka dengan Anjaria dan responden. Pada 25 Jun 2001, perayu-perayu memfailkan tindakan di Mahkamah Tinggi terhadap Anjaria dan responden untuk pelbagai wang yang kena dibayar kepada mereka di bawah projek-projek tersebut. Pada 30 Jun 2004, Anjaria memfailkan permohonan untuk meminda penyataan pembelaannya. Permohonan yang sama difailkan oleh responden pada 9 Julai 2004 untuk meminda penyataan pembelaannya di mana termasuk tuntutan balas yang baru. Pendaftar menolak permohonan Anjaria tetapi membenarkan permohonan responden. Atas rayuan kepada hakim, permohonan Anjaria dibenarkan dan keputusan pendaftar atas permohonan responden disahkan. Rayuan perayu-perayu ke Mahkamah Rayuan terhadap kedua-dua keputusan ditolak. Izin dibenarkan untuk merayu ke Mahkamah Persekutuan. Perayu-perayu berhujah bahawa kausa tindakan di mana tuntutan balas yang baru diasaskan berlaku pada Februari 1998 dan memandangkan tuntutan balas hanya dipohon untuk ditambah melalui pindaan pada 9 Julai 2004, ia dihalang oleh statut.

Diputuskan, menolak rayuan dengan kos:

(1) Jika tuntutan balas difailkan sebagai tindakan baru, ia akan dihalang oleh had masa. Tetapi memandangkan ia difailkan sebagai tuntutan balas, s 31 Akta Had Masa 1953 beraplikasi. Tuntutan balas bukan dihalang statut. Mengikut s 31 tuntutan balas dianggap sebagai tindakan berasingan dan

A bermula pada hari yang sama seperti tindakan di mana ia diplid iaitu 25 Jun 2001 (lihat perenggan 30 & 33).

(2) Tarikh pemfailan tuntutan balas adalah berkaitan dengan tarikh tindakan asal. Mengambilkira kausa tindakan berlaku pada Februari 1998, seperti yang diplidkan oleh perayu-perayu, permohonan responden adalah dalam masa tempoh enam tahun pada tarikh tindakan dimulakan oleh perayu-perayu (lihat perenggan 33).]

Notes

For a case on counterclaim, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 571.

Cases referred to

Henriksens Rederi A/S v P H Z Rolimpex [1973] 3 All ER 589, CA (refd)
Hock Hua Bank Bhd v Leong Yew Chin [1987] 1 MLJ 230; [1987] 1 CLJ 126, SC (refd)
Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213, FC (refd)

Legislation referred to

Limitation Act 1953 ss 6(1)(a), 31
Limitation Act 1939 [UK] s 28
Limitation Act 1980 [UK]
Rules of the High Court 1980 O 20 r 1, O 20 r 5

Appeal from: Criminal Appeal Nos W–03–179 of 2000 and W–03–180 of 2005 (Court of Appeal, Putrajaya)

Arthur Wang Ming Way (CM Wong & Shareena Shahril with him) (Arthur Wang, Lian & Associates) for the appellants.
James Selva (Normaezah Ismail with him) (Ong Kok Bin & Co) for the respondent.

Arifin Zakaria CJ (Malaya) (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the Court of Appeal dated 30 October 2008 dismissing the appellants' appeal. Leave to appeal was granted by this court on 1 December 2008 on the following questions:

Question 1

> Where counterclaims are concerned, whether leave to amend under O 20 r 1 of the Rules of the High Court 1980 ('RHC'), is limited to amendments of existing counterclaims and does not extend to the introduction of a fresh counterclaim by way of amendments.

Question 2

Where counterclaims are concerned, whether the power of a High Court to grant leave to amend pursuant to O 20 r 5(2) is limited to the granting of leave to amend existing counterclaims and does not extend to permitting the introduction of fresh counterclaims by way of amendments.

Question 3

Whether s 31 of the Limitation Act 1953 is relevant to the exercise of discretion under O 20 r 5(5), RHC where leave is sought to amend a defence to introduce a fresh counterclaim.

Question 4

Where leave to amend pleadings 'in toto', whether such an application is one which prejudices the other party in a manner that cannot be compensated and should as a matter of course, save where exceptional basis is put before the court by the applicant, be dismissed.

Question 5

In connection with question four above, whether a court is entitled to conclude that an application for amendment of the nature described is an application lacking in bona fide where justification is not provided by the applicant

In this judgment, the appellants will be referred to as the plaintiffs and the respondent as the second defendant as in the trial court.

THE FACTS

[2] The facts relevant to this appeal as distilled from the pleadings and the affidavits filed herein are briefly as follows: The plaintiffs at all material times were involved in building and construction industry. They were contractors who had taken over four incomplete projects which were previously undertaken by the first defendant.

[3] The first defendant is a company known as Anjaria Porperties Sdn Bhd. The principal business of the first defendant at all material times was building industry. The second defendant was at all material times the executive chairman of the first defendant. He is being sued in his personal capacity.

[4] Between 18 April 1995 to 7 May 1996, the first defendant was commissioned by Jabatan Kerja Raya ('JKR') for the building and construction of four government projects ('the said projects'). Due to cash flow problems faced by the first defendant, the second defendant sought the help of one Dato' Dr Nik Hussain Abdul Rahman ('Dato' Nik Hussain') to assist the first

defendant in completing the said projects. Dato' Nik Hussain was the corporate representative of the first and second plaintiffs.

[5] After a series of meetings between the second defendant and Dato' Nik Hussain, an understanding was reached wherein that the second plaintiff would effectively take over the first defendant's role in the said projects. The takeover would be fronted by the first plaintiff as it was a bumiputra company. It was also agreed that to all intents and purposes, the first defendant would publicly remain as the contractor appointed for the said projects. It was also agreed that a sum of RM10,260,399.48 was to be paid to the second plaintiff for the works it was to undertake.

[6] The second plaintiff commenced works. At the outset, the second defendant was compelled by circumstance to deal with third party contractors who were originally engaged by the first defendant which had certain sums due and owing to them. The second plaintiff requested for funds from the first defendant to settle the debts.

[7] The first defendant, through the second defendant, requested the first plaintiff to advance the sums on the understanding that these sums will be repaid. Consequently, and with the knowledge and consent of the first and second defendants, a sum of RM1,200,000 was advanced by the first plaintiff. The second plaintiff used the sum to settle outstanding debts to the said third party contractors. The plaintiffs also claimed from the defendants a sum of RM2,216,404.68, which the plaintiffs said was expended by them on the said projects. Claim for this sum was made by the plaintiffs to the first defendant from time to time.

[8] The plaintiffs alleged that sometime in February 1998, the first defendant appointed contractors to replace the second plaintiff and/or the first plaintiff. The plaintiffs contended that that constituted repudiation of the agreement between the first and second defendants with the plaintiffs.

[9] By their solicitors' letter dated 30 April 2001, the plaintiffs accepted the repudiation and termination of the said agreement.

[10] Further, or in the alternative, the plaintiffs averred that the first defendant was to hold monies received from JKR for the benefit of the second and/or the first plaintiff and to that end, the first defendant was at all material times, a constructive trustee of the plaintiffs over the said monies. The plaintiffs prayed for an order that the first and second defendants jointly and severally pay damages to them. Alternatively, the plaintiffs prayed for an order that the

first and second defendants jointly and severally, pay the sum of RM 2,216,404.68 to the second plaintiffs, and the sum of RM1,200,000 to the first plaintiff.

[11] Against the second defendant, the plaintiffs averred that the second defendant had deceived them by stating that the funds for the said project coming from JKR would be paid to them, although he knew at all times that the first defendant would not be paying either of them. In the alternative, the plaintiffs averred that the board of the first defendant at all times acted in concert with the second defendant and as such the first defendant had been a participant in the deception carried out by the second defendant as a joint tortfeasor. Further, or in the alternative, it was averred that the first and second defendants had conspired to injure the first and/or the second plaintiff.

[12] In the High Court, the first and second defendants filed separate defences, in which they denied liability. Essentially, they denied that the plaintiffs were entitled to any monies or at all payable by the JKR or that the first defendant was a constructive trustee for such monies as alleged because:

(a) There was no enforceable contract whatsoever between the plaintiffs and first defendant; and

(b) Even if there was a contract, the plaintiffs had by their conduct, been in breach of the contract

THE HIGH COURT

[13] By summons in chambers dated 6 December 2002, (encl 18), the plaintiffs applied for summary judgments against the defendants for:

(a) The sum of RM336,683.56 which the plaintiffs alleged was advanced by them to the creditors of the first defendant who were involved in the said project, and

(b) The sum of RM2,216,404.68 for the progress claims which the plaintiffs alleged were made to the first defendant for works carried out on the said projects.

[14] On 10 May 2004, the senior assistant registrar ('SAR') of the High Court entered a summary judgment against the defendants for part of the amount prayed for by the plaintiffs in encl 18.

[15] Subsequently, the first defendant filed summons in chambers dated 30 June 2004, (encl 38), to amend its statement of defence dated 4 September 2001. Later, the second defendant also filed summons in chambers dated 9 July 2004, (encl 40) to amend his statement of defence, which includes a new

counter claim. The second defendant, in his counterclaim, inter alia, prayed for:

(a) The plaintiffs jointly and severally liable to pay the second defendant for loss of investment in the sum of RM2,400,00 with interest thereon at the rate of 8%pa from January 2004 till the date of full realisation;

(b) The plaintiffs jointly and severally pay to the second defendant for lost of allowance of RM4,000 a month from January 2003 till full settlement with interest thereon at the rate of 8%pa from January 2003 till full realisation;

(c) Costs of this action to be paid by the plaintiffs in any event; and

(d) Such further relief or other relief as this court deems fair and reasonable to grant.

[16] On 27 August 2004, the learned SAR allowed the application in encl 40 and the plaintiffs appealed to the learned judge against the SAR's decision ('encl 47').

[17] On 10 January 2005, the learned SAR dismissed the application in encl 38 with costs. And, the first defendant appealed to the learned judge against the SAR's decision ('encl 52').

[18] The learned judge heard the appeals in encls 47 and 52 together. On 26 October 2005, the learned judge dismissed the plaintiffs' appeal in encl 47. On the same date, the learned judge allowed the first defendant's appeal in encl 52.

[19] In allowing encl 52, the High Court in a brief grounds of judgment stated:

> 1. the plaintiffs would not in any way be prejudiced by allowing the amendment to include the counter claim by both the first and second defendants as proposed. The question of whether the statute of limitation has set in at this stage is triable. The counter-claim would not prevent the plaintiffs from entering a defence of limitation at the trial, or at an earlier stage if it so wishes by an application under O 18 r 19 to strike out the defendants' counterclaim.

THE COURT OF APPEAL

[20] Aggrieved, the plaintiffs appealed to the Court of Appeal against the decision of the High Court. The plaintiffs filed two separate appeals against the High Court decision in respect of encl 47 and encl 52. The Court of Appeal dismissed both appeals with costs.

[21] In the Court of Appeal, the plaintiffs contended that the first defendant's proposed amendment to its statement of defence includes a counterclaim which constitutes to a new cause of action, which was statute-barred. Learned counsel submitted that in his statement of defence, the first defendant pleaded that there was no privity of contract between it and the appellants. However, in the counterclaim the first defendant averred in the alternative that even if there was a contract between them, there was a breach of it by the plaintiffs.

[22] He further argued that the alleged breach occurred when the plaintiffs stopped work and the first defendant put in their own workers. But the first defendant had not, either in its statement of defence or in its counterclaim, specified when the alleged breach by the plaintiffs had occurred. The plaintiffs in their statement of claim averred that the first defendant had placed its worker at the construction sites at or about February 1998, that tantamount to a repudiation of contract by conduct. Since this was not denied by the first defendant in either it's statement of defence or counterclaim, it must be taken to have been admitted.

[23] In the circumstances, the plaintiffs contended that the cause of action on which the proposed counterclaim was based had occurred at the latest by end of February 1998. While, the proposed counterclaim was filed on 9 July 2004 ie five months passed the limitation period.

[24] The Court of Appeal did not agree with the plaintiffs' submission and the appeal was accordingly dismissed. Their reasons for coming to that decision are found in the following passage of their judgment which reads:

> So, s 31 of the Limitation Act 1953 is relevant and reference must be made to it. That provision is similar to s 28 of the English Limitation Act 1939. The annotation to this section in 19 *Halsbury's Statute* (3rd Ed) at p 89 is as follows:
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> The effect of this section is that, if this Act is pleaded to a defence of set-off or a counterclaim, the plaintiff, in order to establish his pleas, must prove that the set-off or counterclaim was barred when he himself commenced his action and it is not enough to prove that it was barred at the time when it was pleaded.
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> Since the appellants had raised the issue of the counterclaim being barred by the Limitation Act 1953, under s 31 of the Act, they must prove that the counterclaim was barred when they commenced their action (25 June 2001). Going by what was pleaded in the statement of claim that the cause of action had arisen at the end of February 1998, the counterclaim of the first respondent was not barred by the Act

GENERAL PRINCIPLE GOVERNING AMENDMENT OF PLEADINGS.

[25] Generally, the court may at any stage of the proceedings allow either

party to alter or amend his pleadings in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties.

[26] The rule permits amendments at any stage and it does not matter whether the original omission arose from negligence or carelessness but such amendments are allowed only when they occasion no injury and cause no injustice to the opposite party or where they can be sufficiently compensated by costs or other terms imposed by the court.

The above principles are contained in O 20 r 5 of the Rules of the High Court 1980 ('the RHC') which provides:

> Order 20 Amendment
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> Rule 5. Amendment of writ or pleading with leave. (O. 20 r. 5)
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> (1) Subject to Order 15, rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.
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> (2) Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.
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> (3) An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.
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> (4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under paragraph (2) if the capacity in which, if the amendment is made, the party will sue is one in which at the date of issue of the writ or the making of the counterclaim, as the case may be, he might have sued.
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> (5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.

[27] In *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213, the Federal Court stated the right approach to be adopted in dealing with amendment of pleading. It said:

> The general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result, (1) whether the application is bona fide; (2) whether prejudice caused to the other side can be compensated by costs and (3) whether the amendments would not in effect turn the suit from one character into a suit from one character into a suit of another and inconsistent character.

[28] In the case of *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230; [1987] 1 CLJ 126, the Supreme Court held:

> As for general principles for the granting of leave to amend: 'lt is a guiding principle of cardinal importance on the question of amendment that generally speaking, all such amendments ought to be made 'for the purpose of determining real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings' (see per Jenkins LJ in *GL Bakar Ltd v Medway Building & Supplies Ltd* [1958] 1 WLR 1216 at p 1231; [1958] 3 All ER 540 at p 546).
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> It is a well established principle that the object of the court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights …. I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right' (per Bowen LJ in *Cropper v Smith* (1883) 26 Ch D 700, at pp 710–722, with which observations AL Smith LJ expressed 'emphatic agreement' in *Shoe Machinery Co v Cultam* [1896] 1 Ch 108, at p 112).

[29] In the present appeal, the plaintiffs did not object to the amendment to the statement of defence, however, they took objection to the counterclaim on the sole ground that it was filed outside of the relevant limitation period.

[30] In this case, the counterclaim is a claim in contract, and the applicable limitation period would be six years from the date of the accrual of the cause of action (see s 6(1)(a) of the Limitation Act 1953 'the Act'.) Taking the date of the alleged breach as February 1998, as pleaded by the plaintiffs, the limitation period would have expired sometime in February 2004. The counterclaim was filed on 9 July 2004. Therefore, had it been filed as a fresh action, it would have been barred by limitation. However, since it was filed as a counterclaim s 31 of the Act would apply; it provides as follows:

A 31. Provisions as to set-off or counter-claim.

For the purposes of this Act, any claim by way of set-off or counterclaim shall be deemed to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded.

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[31] This section is similarly worded as s 28 of the English Limitation Act 1939, which is now replaced by Limitation Act 1980.The commentary on s 28 of the English Limitation Act 1939 is applicable for our purpose. This is found at p 89 of the *Halsbury's Statutes of England*, (3rd Ed) Vol 19, which reads:

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> The effect of this section is that, if this Act is pleaded to a defence of set-off or a counterclaim, the plaintiff, in order to establish his plea, must prove that the set-off or a counterclaim was barred when he himself commenced his action and it is not enough to prove that it was barred at the time when it was pleaded. This was formerly the rule as to set-off, but, in the case of a counterclaim, it was formerly
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> D sufficient to prove that it was barred when pleaded (*Walkers v Clement* (1850) 15 QB 1046; *Lowe v Bentley* (1928) 44 TLR 388)

[32] This section came for consideration by the English Court of Appeal in
E *Henriksens Rederi A/S v P H Z Rolimpex* [1973] 3 All ER 589. Lord Denning in that case succinctly stated the effect of the said section as follows:

> I would state the effect of s 28 in this way: Where the plaintiff owes the defendant a debt arising from a separate transaction, the defendant can raise it by way of set-off. If it is time-barred at the date when the plaintiff issues his writ, it is time-barred still.
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> F But if it is not time-barred at the time when the plaintiff issues his writ, the defendant can raise it in opposition to the plaintiff's claim without being affected by any intervening running of time. That was decided in *Walker v Clements*, which is given statutory effect by s 28. In that case, as in every legal set-off, the debts arose out of separate transactions.
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> G Where the defendant has a cross-claim for damages arising from a separate transaction, he can either bring a separate action for it: in which case he is subject to the ordinary time-bar. Alternatively, he can raise it by way of counterclaim. Before 1939, if he was time-barred for separate action, he was time-barred for a counterclaim; because the counterclaim only dated from the time of its delivery: see
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> H *Lowe v Bentley*. But by s 28 a counterclaim, which arises out of a separate transaction, is on the same footing as a set-off. If it is not time-bared at the time when the plaintiff issues his writ, the defendant can raise it in opposition to the plaintiff's claim without being affected by any intervening running of time.

I **[33]** Applying the above stated principles to the present case, it is clear that the counterclaim is not barred by limitation. This is so because by virtue of s 31 of the Act, the counterclaim is deemed to be a separate action and to have been commenced on the same date as the action in which the counterclaim is pleaded ie 25 June 2001. In other words, the date of filing of the counterclaim

relates back to the date of the original action. Thus, taking the cause of action as accruing in February 1998, as pleaded by the plaintiffs, the second defendant was well within the six years period on the date this action was commenced by the plaintiffs. Therefore, the counterclaim cannot be said to be time-barred. That is sufficient to dispose of this appeal and we do not think it is necessary for us to answer the questions in the manner they were posed to us.

CONCLUSION

[34] For the above reasons, we wholly agree with the conclusion arrived by the Court of Appeal and accordingly the appeal is dismissed. Costs to the second defendant.

Appeal dismissed with costs.

Reported by Ashok Kumar